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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, ET AL., *Petitioners,*

v.

CENTRAL POWER & LIGHT COMPANY, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT HOUSTON LIGHTING & POWER COMPANY IN SUPPORT

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OPINIONS BELOW AND JURISDICTION

The opinions below are correctly referenced and the jurisdictional prerequisites are adequately set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Federal Power Commission (now the Federal Energy Regulatory Commission) (Commission) possesses any power under the Federal Power Act (Act) to exercise jurisdiction over electric utility companies which, at the time of the Commission's decision, neither own nor operate facilities for the transmission or sale of electric energy in interstate commerce, and which neither transmit nor sell electric energy in interstate commerce.

STATUTES INVOLVED

Sections 201 and 202 of the Federal Power Act are correctly set forth in the Petition for a Writ of Certiorari.

STATEMENT OF THE FACTS

Houston Lighting & Power Company (HL&P) agrees with the Petition for a Writ of Certiorari that all facts relevant to the jurisdictional Question Presented are admitted by all parties. HL&P therefore adopts the Statement of the Facts contained in the Petition for a Writ of Certiorari.

ARGUMENT

THE REMAND BY THE COURT OF APPEALS OF THE JURISDICTIONAL ISSUE CONTRADICTS THE LANGUAGE AND INTENT OF THE FEDERAL POWER ACT

HL&P supports the Reasons for Granting the Writ contained in the Petition for a Writ of Certiorari. HL&P agrees that by failing to consider the Commission's lack of the requisite statutory *power* to exercise jurisdiction based on the uncontroverted record facts, the Court of Appeals improperly remanded a pure question of agency jurisdiction. As stated in the Petition for a Writ of Certiorari, it is the duty of the appellate court to decide such jurisdictional issues. See *Stark* v. *Wickard*, 321 U.S. 288, 309-10 (1943).

Had the Court of Appeals reached the merits of the jurisdictional issue by analyzing Sections 201 and 202 of the Act, it could only have found that the Commission had no discretion to exert jurisdiction. The reach of the Commission's jurisdictional power is delineated by Section 201. The Commission has no discretion to exercise jurisdiction beyond the bounds identified in Section 201.

Thus, the Commission can exert jurisdiction only over statutory "public utilities." Under Section 201(e), a

utility is a statutory public utility *only* if it "owns or operates facilities subject to the jurisdiction of the Commission." Section 201(b) identifies those facilities which are subject to the jurisdiction of the Commission as those for the "transmission of electric energy in interstate commerce" and for "the sale of electric energy at wholesale in interstate commerce."

By this definition, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis." *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). The uncontroverted facts in this proceeding, as recited in the Petition for a Writ of Certiorari, allowed the Court of Appeals to track the jurisdictional line drawn by the Commission.

As the Commission found, based on uncontroverted facts, HL&P was susceptible to the claim of jurisdiction only during a ten-hour period on May 4, 1976. During this short period, HL&P was se ctly and involuntarily interconnected with electrical systems which directly or indirectly transmitted or sold electric energy in interstate commerce.

At 3:43 p.m., May 4, 1976, however, all interconnections with electrical systems which directly or indirectly transmitted or sold electrical energy in interstate commerce were opened. From that point, as a matter of law, there has been no jurisdictional basis under the Federal Power Act to permit the exercise of jurisdiction.

Moreover, the right of an electric utility to structure its operations to remain a nonjurisdictional, intrastate company, or to remove itself from the reach of the Commission's jurisdiction by terminating interstate operations, has been specifically recognized by the Supreme Court, the United States Court of Appeals for the Second Circuit and the Commission. *Connecticut Light & Power Co.* v. *FPC*,

324 U.S. 515, 517-519, 531 (1945); *Hartford Elec. Light Co.* v. *FPC*, 131 F.2d 953, 960 (2d Cir. 1942); *Connecticut Light & Power Co.*, 6 F.P.C. 104, 110 (1947). The remand by the Court of Appeals is thus contrary to these authorities as well as in conflict with the specific jurisdictional provisions of the Federal Power Act.

CONCLUSION

For the foregoing reasons, Respondent Houston Lighting & Power Company respectfully submits that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the Brief of Respondent Houston Lighting & Power Company In Support on counsel of record for the other parties by United States Mail, postage prepaid, on September 25, 1978.

/s/ STEVEN HUNSICKER

STEVEN HUNSICKER